INDEX

PAGE

Brief of Appellants 1

The Official Report of Opinions Delivered in the Courts Below 1

Jurisdiction 2

Statement of the Case 3

Specifications of Error 22

Summary of Argument 23

I. Under the Constitution of Oklahoma, like that of Virginia, a legislative appeal lies to the Supreme Court of the State from legislative orders of its Corporation Commission, and that Court has power to substitute its own order and to grant a supersedeas pending the appeal 23

II. Under the findings of fact made by the court and the undisputed evidence in the record, Order No. 3388 of the Corporation Commission is null and void in that it endeavors to compel one public service corporation, Oklahoma Natural Gas Company, to assume and perform a public service which had never been professed or undertaken by it and to take business from another public service corporation, Oklahoma Gas and Electric Company, for which it had made substantial financial investments and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United Sates 26

III. The order is also null and void as impairing the obligation of a contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, which provided that as to consumers of gas within the city gates or measuring stations, so situated as Wilson & Co., Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, in contravention of Section 10, Article I of the Constitution of the United States 27

IV. The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation, and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein 29

PAGE

Argument 30

Proposition No. 1: The statutory three-judge court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission of Oklahoma as a defense in the suit instituted by Wilson & Co., Inc., in the District Court of Oklahoma County, Oklahoma, against said company and its surety for the collection of the refund or overcharge alleged to be due it because of noncompliance with the order of the Corporation Commission 30

(A) The District Courts of the United States have equity jurisdiction to enjoin the order of a state utility commission wherein complainants assert its invalidity under the Constitution of the United States, and such equity jurisdiction is not ousted where appellants have no remedy at law in the Federal Courts .. 30

(B) Under the Constitution and laws of the State of Oklahoma, as construed by its highest court, the validity of an order of its Corporation Commission, although affirmed by its Supreme Court in its legislative capacity, may not be adjudicated in any action at law in the State Courts 35

Proposition No. II: Under the findings of fact made by the court and the undisputed evidence in the record, Order No. 3388 of the Corporation Commission is null and void in that it endeavors to compel one public service corporation, Oklahoma Natural Gas Company, to assume and perform a public service which had never been professed or undertaken by it and to take business from another public service corporation, Oklahoma Gas and Electric Company, for which it had made substantial financial investments, and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States 43

Proposition No. III. The order is also null and void as impairing the obligation of a contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, which provided that as to consumers of gas within the city gates or measuring stations, so situated as Wilson & Co., Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company in contravention of Section 10, Article I of the Constitution of the United States 61

Proposition No. IV: The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein 63

Appendix 67

Authorities Cited

A.

PAGE

Atchison, T & S. F. R. Co. v. Miller, 28 Okla. 109, 114 Pac 1104 23
Atchison, T. & S. F. R. Co. v. State, 23 Okla. 510, 101 Pac. 262 23
Attorney General v. Consolidated Gas Co. of N. Y., 108 N. Y. S. 823 ... 28

B.

Bohler v. Callaway, 267 U. S. 479, 45 S. Ct. 431 ..... 24, 25, 32, 41
Boise City Irr. & Land Co. v. Clark, supra 65

C.

Chicago, R. I. & P. R. Co. v State, 24 Okla. 370, 103 Pac. 617 23
Chicago, & N. W. Ry. Co v. R. & W. Commission, 280 Fed. 387 ..... 24, 32
City of Poteau v. American Indian Oil & Gas Co., 159 Okla. 240, 118 Pac. (2d) 523 ..... 23, 31
City Bank Farmers Trust Co. v. Schnader, 54 S. Ct. Rep. 259 (U. S.) 24, 35
Cumberland Tel. Co. v State ex rel. Attorney General, 100 Miss. 102, 54 So. 670 ..... 28, 62
Conroe v. Bull, 7 Wis. 354 38

E.

Ex parte City of Birmingham, 199 Ala. 9, 74 So. 51 ..... 27, 62
Ex parte Young, 209 U. S. 123 ..... 24, 33

I.

In re Consolidated Gas Co. of N. Y., 106 N. Y. S. 407 ..... 28, 63
In re Vance et al., and Oklahoma Natural Gas Co. et al. v. Scott, consolidated, 115 Okla. 8, 241 Pac. 164 ..... 26, 48, 56, 58
Interstate C. C. et al. v. Oregon-Washington Ry. & Navigation Co. et al., 288 U. S. 14, 77 L. ed. 310, 53 Sup. Ct. 266 ..... 26, 57

K.

Kansas City Southern Ry. Co. v. Cornish et al., 65 Fed. (2d) 671 ..... 25, 42

M.

Martin v. Mott, 12 Wheat. 19, 6 L. ed. 537 38
Matthews v. Rodgers, 284 U. S. 521, 526 ..... 24, 25, 34
McKinley Tel. Co. v. Cumberland Tel. Co., 152 Wis. 359, 140 N. W. 38 .. 27, 62
Missouri v. C., B. & Q. R. R. Co., 241 U. S. 533 ..... 24, 33

N.

Newark Nat. Gas & Fuel Co. v. City of Newark, 242 U. S. 405, 61 L. ed. 393 4
North Pacific S. S. Co. v. Industrial Accident Commission, 23 Fed. (2d) 109 24

O.

Oklahoma City et al. v. Corporation Commission et al., 80 Okla. 194, 195 Pac. 498 4
Oklahoma Natural Gas Co v. Corporation Commission, 88 Okla. 51, 211 Pac. 401 26
Oklahoma Natural Gas Co. v. Russell et al., 261 U. S. 290 ..... 23, 24, 31, 33

PAGE

Oklahoma Gas and Electric Co. v. Wilson & Co. et al., 54 Fed. (2d) 596 ..... 17, 23, 29, 31
Oklahoma Operating Co. v. Love, 252 U. S. 311 ..... 24, 29, 33, 63

P.

Peoples Transit Co. v. Henshaw, 20 Fed. (2d) 87 ..... 27, 62
People v. Navarre, 22 Mich. 1 38
Pioneer Tel. & Tel. Co. v. State, 40 Okla. 417, 138 Pac. 1083 ..... 25, 38, 39
Pioneer Tel & Tel. Co. v. City of Bartlesville, 40 Okla. 583, 139 Pac. 694, 696 23
Pond on Public Utilities, 3rd ed., Section 901 ..... 27, 62
Prentis v. Atlantic Coast Line, 211 U. S. 210 ..... 23, 24, 31, 33
Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. ed. 577, 586 4

R.

Risty v. Chicago, R. I. & P. Ry. Co., 270 U. S. 378 ..... 24, 32
Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 Pac. (2d) 582 41

S.

Southern Bell Tel. & Tel. Co. v. Town of Calhoun (W. D. So. Carolina), 287 Fed. 381 ..... 25, 55
Southern Pacific Terminal Co. v. Interstate Commerce Commission and Young, 219 U. S. 498 ..... 29, 65
Smyth v. Ames, 169 U S. 466 ..... 24, 33
State ex rel. Haskell v. Huston, 21 Okla. 782 38
State v. Hastings, 10 Wis. 468 38
State Public Utilities Comm. v. Rombert, 275 Ill. 432, 114 N. E. 191 ..... 28, 62
Station WBT, Inc., v. Poulnot, Sheriff, et al., 46 Fed. (2d) 671 ..... 29, 64

T.

Terrace v. Thompson, 263 U. S. 197 ..... 24, 29, 33, 64
Texas & Pacific Ry Co. v. G. C. & S. F. Ry. Co., 270 U. S. 266, 277 27
Traux v. Raich, 239 U. S. 33 ..... 24, 29, 33, 64
T. & P. Ry. Co. v. Gulf., etc., Ry. Co. 270 U S. 266, 277 62

U.

Union Pacific R. R. Co. v. Weld County, 247 U. S. 282, 38 S. Ct. 510 ..... 32, 41
United Fuel Gas Co. v. Public Service Commission, 105 W. Va. 603, 144 S. E. 23 ..... 26, 56, 58

W.

Wayne-Monroe Tel. Co. v. Ontario Tel. Co., 112 N. Y. S. 424 ..... 27, 62
Willcox v. Consolidated Gas Co., 212 U. S. 19 ..... 25, 42
Winfield v. Public Service Commission of Indiana, 187 Ind. 53, 118 N. E. 531 ..... 28, 63
Wyoming Valley Water Supply Co v. Public Service Commission, 104 Pa. S. 432, 159 Atl. 340 ..... 26, 60

Y.

Younts v. Southwestern Tel. & Tel. Co. (E. D. Ark.), 192 Fed. 200 ..... 26, 54, 56

STATUTES

	PAGE
Section 380, U. S. C. A., Title 28 (Judicial Code, Section 266, amended)	2
Section 345, U. S. C. A., Title 28 (Judicial Code Section 238, amended)	2
Section 7, Article II of the Constitution of the State of Oklahoma	20
Section 10, Article I of Constitution of United States	20, 23, 27, 60, 61
Sections 19 to 24, inclusive, Article IX, Oklahoma Constitution	23, 25, 30, 36
Section 20, Article IX of the Constitution of Oklahoma	36
Sections 3626, 3627, Oklahoma Statutes 1931 (Sections 3470, 3471, C. O. S. 1921)	25, 37
Section 24 of Article IX, Constitution of Oklahoma	39
U. S. C. A. 384, Title 28	31

NO. 832

In the Supreme Court of the United States

OCTOBER TERM, 1933.

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, W. T. PHILLIPS, JR., ET AL.,
Appellants,

VERSUS

OKLAHOMA PACKING COMPANY, Formerly Wilson & Company, Inc., of Oklahoma; WILSON & COMPANY, INC., OF OKLAHOMA, ET AL.,
Appellees.

BRIEF OF APPELLANTS

THE OFFICIAL REPORT OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion on application for interlocutory injunction of the statutory three-judge court, composed of Circuit Judge John H. Cotteral and District Judges Edgar S. Vaught and Franklin E. Kennamer, has not been officially reported but appears in the printed record at page 58.

The opinion on application for permanent injunction of the statutory three-judge court, composed of Circuit Judge George T. McDermott and District Judges Edgar S. Vaught and Franklin E. Kennamer, has not been officially reported but appears in the printed record at page 66.

JURISDICTION

Statement as to jurisdiction has been made in compliance with paragraph 1 of rule 12 of this Court and has been printed and filed.

The appeal herein was taken by appellants from a final judgment and decree rendered by the District Court of the United States for the Western District of Oklahoma, composed of a three-judge statutory court, pursuant to the provisions of Section 380, U. S. C. A., Title 28 (Judicial Code, Section 266, Amended) and Section 345, U. S. C. A., Title 28 (Judicial Code, Section 238, Amended). That court denied the appellants and each of them an injunction against the appellees from enforcing or attempting to enforce an order of the Corporation Commission of the State of Oklahoma alleged in their bill to be null and void as being repugnant to the Constitution of the United States, and dismissed appellants' bill of complaint (R. 83).

The Court made findings of fact and conclusions of law (R. 68). The bill was dismissed as to the appellant, Oklahoma Gas and Electric Company, on the ground that it had an adequate remedy at law in the District Courts of Oklahoma wherein it assailed the order of the Corporation Commission as contravening the Constitution of the United States as a defense to the suit of Wilson & Company (now Oklahoma Packing Company), one of the appellees herein, for alleged refunds based upon and arising out of the Commission's order. The bill was dismissed as to the appellants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, on the ground that

said appellants had no substantial interest in the controversy (R. 66).

STATEMENT OF THE CASE

The circumstances out of which the appellants' causes of action arose may be briefly stated as follows:

On November 13, 1925, and for many years prior thereto the Oklahoma Natural Gas Company was a corporation engaged in the business of the production, distribution and sale of natural gas as a public utility, supplying gas at wholesale to distributing companies operating under franchises in various cities and towns in the State of Oklahoma, which companies in turn sold and distributed the gas so supplied to domestic and industrial consumers in and near said cities and towns and furnished the organization and facilities for such purposes (R. 97). The Oklahoma Natural Gas Company also held franchises and owned and operated distribution systems in about thirty cities and towns in the State (R. 97) (See Map Exhibit 2, R. 90a).

In September, 1926, the Oklahoma Natural Gas Corporation purchased all the gas properties, including franchises of Oklahoma Natural Gas Company and the former continued thereafter to operate the transmission and distribution systems in Oklahoma (R. 73). The old company was dissolved.

The Oklahoma Gas and Electric Company was a public utility corporation engaged in the sale and distribution of gas in Oklahoma City, Muskogee, Enid, Shawnee and a

number of other cities and towns of Oklahoma, and in the vicinities thereof (R. 97).

At the point or points of delivery of the gas by the Oklahoma Natural Gas Company into the local distribution systems regulators reduced the gas from high pressure to low pressure to put it into condition for use by the customers of the distribution companies (R. 97).

Prior to the promulgation by the Corporation Commission of what is known as the "gate rate order" in June, 1921, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City, Oklahoma, under contracts and arrangements on a percentage basis (R. 98). The relation created by said contracts was that of seller and buyer.

Oklahoma City et al. v. *Corporation Commission et al.*, 80 Okla. 194, 195 Pac. 498.

Newark Nat. Gas & Fuel Co. v. *City of Newark*, 242 U. S. 405, 61 L. ed. 393.

Public Utilities Commission v. *Landon*, 249 U. S. 236, 63 L. ed. 577, 586.

Per curiam opinion of three-judge court on application for temporary injunction (R.).

Opinion by three-judge court by McDermott, Circuit Judge, on application for permanent injunction (R. 66).

Under the terms of this contract the Oklahoma Gas and Electric Company had the privilege of supplying and did supply all the consumers it desired to serve within a radius of five miles of Oklahoma City and within such radius of the other cities and towns in which it operated (R. 98). Its distribution system extended around Oklahoma City in

many directions and was designed to serve its customers in the vicinity of Oklahoma City as well as within the city limits (R. 95). This was also the situation at the other towns served by it.

The "gate rate order" abrogated the contracts theretofore existing between the two companies and provided that thereafter the gas should be metered by the seller before passing into the distribution systems of the buyer and paid for on a volume basis at the rates per thousand cubic feet therein prescribed. The order also fixed the rates to be charged consumers served by the Oklahoma Gas and Electric Company (R. 76).

Among the numerous patrons supplied gas by the latter company from its distribution lines in Oklahoma City and vicinity was Wilson & Co. of Oklahoma, an Oklahoma Corporation, which conducted a meat packing plant in Oklahoma County, southwest of and outside the corporate limits of Oklahoma City (R. 69). On December 3, 1931, the packing plant was transferred to Wilson & Co., Inc., of Oklahoma, a Delaware corporation, and later the name of the Oklahoma corporation was changed to Oklahoma Packing Company. Its plant was located north of Ash Avenue and west of Agnew Street, the latter street being then and now the legal corporate limits of Oklahoma City (R. 70). See Map Exhibit 4 (R. 96 B).

Long prior to 1919 the Oklahoma Gas and Electric Company laid lines of sufficient size to serve all of the load in the Packingtown district (R. 95). It had many consumers within that district, both within and without the

city limits. Besides Wilson & Co., Morris & Co., the Coliseum and some mule barns were served with gas outside of the city limits (R. 95-96).

When the "gate rate order" was made and for some time prior thereto, there were only two reducing stations at or through which gas was reduced from high pressure to low pressure and delivered by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company, one of which stations was located at Thirty-sixth Street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, and these stations were outside of the city limits (R. 69) (Map Exhibit "3", 96a).

All of the gas passing through the reducing station at Thirty-sixth Street and Santa Fe Avenue was transported by the Oklahoma Natural Gas Company from north of Oklahoma City and was produced in the fields known as Cushing, Depew, Kellyville and other fields in that vicinity. During the year 1919 the Oklahoma Natural Gas Company built a transmission line to the field known as the Chickasha field, near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said Chickasha field to Independence Avenue in (near) Oklahoma City, and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant of Wilson & Co., extending on to Reno Avenue, thence east on that avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of Wilson & Co.'s packing plant (R. 69-70).

In 1921 the Oklahoma Natural Gas Company construct-

ed a six-inch gas line and connected with the Chickasha line southwest of Oklahoma City. This line ran east through Ash Avenue, which is about five or six hundred feet south of the engine room of Wilson & Co.'s plant. It extended about 1,500 feet east of Wilson's & Co.'s plant and north on Agnew Avenue and connected with a meter or measuring station located at or immediately adjacent to the intersection of Hickory Street and Agnew Avenue on the distribution line of the Oklahoma Gas and Electric Company. It was within 200 feet of the city limits of the city of Oklahoma City (R. 70). This gas line was constructed for use in such emergencies as might arise by the washing out of the river crossings of the Oklahoma Natural Gas Company's line on Independence Avenue, and the measuring station remained in this location throughout the month of September, 1924, and for some time thereafter. At that time Agnew Avenue was and still is the city limits of Oklahoma City, and the plant of Wilson & Co. then was and is now located immediately west of the intersection of Hickory Street and Agnew Avenue and is approximately 1,500 feet outside of the city limits (R. 70).

Commencing with the year 1916 or 1917, Wilson & Co. purchased gas from the Oklahoma Gas and Electric Company for miscellaneous incidental purposes at its plant and at intervals purchased an additional supply of gas for fuel under its boiler plant (R. 74), but it did not purchase and use gas for such fuel purposes from May 14, 1923, until it commenced again in December, 1924. From the date of the gate rate order in 1921, at or about which time the reducing

stations were equipped with meters, it purchased gas for miscellaneous incidental purposes at its plant from the Oklahoma Gas and Electric Company during each and every month until December, 1924, and during some of said months prior to May 14, 1923, purchased additional supplies of gas for fuel under its boiler plant (R. 74).

The Oklahoma Natural Gas Company did not have a franchise to sell gas in Oklahoma City, and it never at any time supplied or offered to supply natural gas to Wilson & Co. at its plant near Oklahoma City (R. 75). Prior to the gate rate order it never supplied or offered to supply gas to any consumer in Oklahoma City or within a radius of five miles thereof, except to consumers over whose land its pipe line was laid, who were supplied pursuant to a statutory obligation. Section 7904, C. O. S. 1921, set forth in the appendix) (R. 98. Subsequent to the making of the gate rate order in June, 1921, it neither supplied nor offered to supply gas to any consumer in Oklahoma City or within the vicinity thereof within the gates or measuring stations or any consumer within the gates at any town or city where the local distribution system was operated by the Oklahoma Gas and Electric Company, or by some other distribution company that purchased its gas from the Oklahoma Natural Gas Company; nor did it supply or offer to supply gas to any consumer outside of said gates and in the vicinity of Oklahoma City, except consumers over whose land its pipe line was laid and except as set forth in the next paragraph hereof (R. 98).

Prior to the making of the "gate rate order" in June, 1921, the Oklahoma Gas and Electric Company had been

supplying gas to users in Oklahoma City both within and without the city limits. When the "gate rate order" was made and the Oklahoma Natural Gas Company was required to put in gates and to measure, sell and deliver gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the gate stations who had been supplied with gas by the Oklahoma Gas and Electric Company, and in carrying out said order it was agreed between the two companies, with the assent of the Corporation Commission, that the Oklahoma Natural Gas Company could, if it desired, continue to supply gas to such consumers outside of the gates, and all or some of them were thereafter so supplied by the Oklahoma Natural Gas Company (R. 71). These were all domestic consumers. The only customer served by the Oklahoma Natural Gas Company after the making of said "gate rate order", outside of said city gates and within the vicinity of Oklahoma City, other than those theretofore served by the Oklahoma Gas and Electric Company and other than those served because of its legal obligation to do so by reason of its pipe lines crossing their properties, was one Billy Gregg. His place was located approximately a mile west of the city limits of Oklahoma City and three miles north of Wilson & Co.'s plant (R. 73-74). He was supplied gas by the Oklahoma Natural Gas Company at the request of Mr. Carter, a member of the Oklahoma Corporation Commission, who stated that Gregg ran a dog hospital (R. 101-102).

The Oklahoma Gas and Electric Company was anxious to resume selling gas to Wilson & Company in large quan-

tities for fuel purposes and had solicited such business for sometime prior to December, 1924. About that time there was a change in the price of fuel and the Oklahoma Gas and Electric Company, having convinced Wilson & Company that it could burn gas cheaper than any other fuel, resumed the delivery of gas for such fuel (R. 92-93). Prior to that time it had been serviced from a line in front of its plant and through a pipe line across its property between its plant and the plant of Morris & Company (shown on Map Exhibit "4" (R. 96 B). This line had not been in use for about two years and when tested it was shown to be in very poor condition (R. 75). It was expensive and difficult to replace as it ran between a cooling tower and fence underneath the pavement in front of the plant. In order to save the expense of replacement the Oklahoma Gas and Electric Company asked the Oklahoma Natural Gas Company if it had any objection to the former company serving Wilson & Company with gas from the temporary line in Ash Street on the south side of the packing plant (R. 93). This being agreeable, it was understood between the two companies that the measuring station should be located on said line south of the plant and the Oklahoma Gas and Electric Company purchased and thereafter, on April 3, 1925, paid for that part of the Oklahoma Natural Gas Company's line between such point and the measuring station at Hickory Street (R. 71). The Oklahoma Gas and Electric Company constructed a service line extending from this emergency line on Ash Avenue to the boiler room of Wilson & Company's plant, a distance of about 450 feet,

and installed the necessary meters and measuring devices (R. 71). The Oklahoma Natural Gas Company was unable to procure a site for a regulator and metering station at the point selected, and it was then agreed between the two companies to establish the regulator station at or near the intersection of Ash and May Avenues, approximately one-third of a mile west of Wilson & Company's plant and approximately 3,000 feet west of Agnew Avenue, the city limits of Oklahoma City (R. 70), and the station at Hickory Street and Agnew Avenue was discontinued (R. 95). The Oklahoma Gas and Electric Company at that time made an oral agreement with the Oklahoma Natural Gas Company whereby the former agreed to purchase that portion of the line on Ash Avenue between the new measuring station near May and Ash Avenues and the point of connection south of Wilson & Company's plant with that part of the emergency line which it had already purchased and paid for (R. 75 and 94). This part of the emergency line was thereupon turned over to the Oklahoma Gas and Electric Company and was thereafter used and maintained by it (R. 94). Thereafter gas supplied by the Oklahoma Gas and Electric Company to Wilson & Company from the Chickasha field passed from the Oklahoma Natural Gas Company's transmission lines into the distribution system of the Oklahoma Gas and Electric Company through this measuring station and it paid the Oklahoma Natural Gas Company for said gas at the city gate rate prescribed by the Corporation Commission. Wilson & Company made no complaint as to this manner of service prior to the institution of the pro-

ceedings before the Corporation Commission on November 13, 1925.

Prior to and at the time of the making of the order complained of herein there was an oral contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company made four or five years prior thereto and extending so long as said Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from said Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as said Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company. (Finding No. II, Three-Judge Court, R. 74-75).

In September, 1924, the Oklahoma Natural Gas Company, being desirous of increasing its sales of gas, made application to the Corporation Commission of the State of Oklahoma to establish a reduction in rates for gas for industrial purposes, in order to enable it to secure the business of industries on its lines located in or near cities where it owned and operated distribution systems (R. 72 and 94). In making the application the company particularly had in mind Cosden & Company in Tulsa, and two or three consumers in Sapulpa, but it was not contemplated that the

rate applied for was to apply at any places where the company did not own and operate the distribution systems (Testimony of R. C. Sharp) (R. 99). The Corporation Commission granted the application and fixed a schedule of lower rates "for industries located outside of the corporate limits of towns and cities served by Oklahoma Natural using 30,000,000 cu. ft. or more per month" (R. 72).

On January 1, 1926, this order was modified so as to apply to consumers using a minimum of 15,000,000 cu. ft. per month (R. 72). After January 1, 1926, the Oklahoma Natural Gas Company supplied gas to the Producers & Refiners Corporation, located immediately outside of Tulsa, Oklahoma, and also supplied gas under this rate to Cosden & Company, Tulsa, and to the Sunflower Glass Company and Sapulpa Refining Company at Sapulpa, Oklahoma (R. 72). During all these times the Oklahoma Natural Gas Company owned and operated the gas distribution systems in Sapulpa and Tulsa, and all such industries were on the Oklahoma Natural Gas Company's lines either within or just without the corporate limits of said cities (R. 72).

In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Okla-

homa City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system theretofore owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rates (R 73).

On November 13, 1925, Wilson & Company filed with the Oklahoma Corporation Commission a petition or complaint against the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company praying that the former be required to supply it directly with natural gas for its use as fuel at a lower rate than that being charged it by the Oklahoma Gas and Electric Company and for any other relief to which it might be entitled. This complaint is attached to appellants' bill of complaint filed in this cause and is marked Exhibit "A" (R. 12). Thereafter and on the 13th day of April, 1926, after a hearing, the Corporation Commission made its findings of fact, opinion and Order No. 3388 requiring the Oklahoma Natural Gas Company to supply Wilson & Company, Inc., with natural gas for its use as fuel at the rate of 35c per thousand cubic feet for the first 100,000 cubic feet and 15c per thousand cubic feet for

each additional thousand cubic feet, provided its consumption per month was 15,000,000 cubic feet or more, the order being conditioned "upon Wilson & Company, Inc. of Oklahoma, either taking over and purchasing the present service line owned and operated by the Oklahoma Gas and Electric Company, or the laying and installing of its own service lines, with all measuring devices and facilities which may be necessary to be installed in rendering said service, without expense to the Oklahoma Natural Gas Company."

The order further provided "that said connection be made and gas turned into the service line of said Wilson & Company of Oklahoma, within ten days from and after notice to said company of the completion of said service line and of the company's readiness to accept service."

The order of the Corporation Commission is attached to the appellants' bill of complaint in this case as Exhibit "B" (R. 17).

The Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company took separate legislative appeals from said order of the Corporation Commission to the Supreme Court of the State of Oklahoma, where said cause was heard as one case upon the record certified to it by the Corporation Commission. Upon allowing the appeal of the Oklahoma Gas and Electric Company the Corporation Commission entered its order suspending the operation of Order No. 3388 pending the determination of the appeal, conditioned upon the Oklahoma Gas and Electric Company's executing a supersedeas bond in the sum of

$25,000.00, which bond was executed by said company with the Fidelity & Casualty Company of New York as surety The Commission also made its order granting supersedeas to the Oklahoma Natural Gas Company, conditioned upon its filing a bond in the sum of $1,000.00.

While the case was pending in the Supreme Court of Oklahoma the Oklahoma Gas and Electric Company made two additional supersedeas bonds in the sums of $15,000.00 and $10,000.00, respectively, upon which the Fidelity & Casualty Company of New York was also surety. The order of the Corporation Commission was affirmed in a written opinion by the Supreme Court of the State acting in a legislative capacity, on the 29th day of April, 1930. The opinion is reported in 146 Okla. 22, 288 Pac. 316. Petitions for rehearing were denied.

Thereafter and on the 24th day of July, 1930, the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, as plaintiffs, filed their bill of complaint in equity in the United States District Court for the Western District of Oklahoma against the Corporation Commission, the members thereof, and the attorney general of the State of Oklahoma and Wilson & Co., Inc., No. 1144 Equity, wherein plaintiffs therein, appellants here, alleged the invalidity of said Order No. 3388 of the Corporation Commission of Oklahoma as affirmed by the Supreme Court of the State with legislative effect, on the ground that said order was invalid and void as to each and both of said appellants in that it constituted the taking of the property

of each appellant without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States. The defendants there, appellees here, filed motions to dismiss the bill on the ground that the decision of the Supreme Court of the State of Oklahoma affirming the order of the Corporation Commission was *res adjudicata*. These motions were sustained by United States District Judge Vaught and the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed from said order of dismissal to the United States Circuit Court of Appeals for the Tenth Circuit. That Court rendered its decision holding that the decision and order of the Supreme Court of Oklahoma affirming said order of the Corporation Commission was legislative and therefore not *res adjudicata* and that appellants were entitled to a judicial determination of the subject-matter of their complaint as set forth in their bill. The case is *Oklahoma Gas and Electric Company v. Wilson & Co. et al.*, 54 Fed. (2d) 596.

While the appeal was pending in the Circuit Court of Appeals, Wilson & Company, Inc., on, to-wit, the 3rd day of December, 1931, filed its petition in the State District Court of Oklahoma County against the Oklahoma Gas and Electric Company and the Fidelity & Casualty Company of New York, in which it alleged the making of Order No. 3388 by the Corporation Commission of the State of Oklahoma, the affirmance of said order by the Supreme Court of Oklahoma, the execution and filing of the supersedeas bonds by the Oklahoma Gas and Electric Company as prin-

cipal and Fidelity & Casualty Company of New York as surety; that upon the suspension of said order, Wilson & Company was compelled to buy gas from Oklahoma Gas and Electric Company and to pay therefor substantially 5c per thousand cubic feet in excess of the price for gas fixed in said order; that the Oklahoma Natural Gas Company had no substantial interest in the controversy and that the proceedings before the Corporation Commission, and thereafter on appeal to the Supreme Court of the State of Oklahoma, were prosecuted on the part of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company for the sole benefit of Oklahoma Gas and Electric Company; that the supersedeas bonds covered only part of the loss sustained by Wilson & Company by reason of the suspension of said order; that the Oklahoma Gas and Electric Company caused the suspension of the order of the Corporation Commission and that by reason thereof Wilson & Company was entitled to recover upon the supersedeas bonds because of their breach and prayed for judgment against the Oklahoma Gas and Electric Company for the difference in the amount it paid the Oklahoma Gas and Electric Company and the amount it would have been required to pay the Oklahoma Natural Gas Company for said gas had said order not been suspended, and against the Fidelity & Casualty Company for so much of said amount as was secured by the supersedeas bonds aforesaid (R. 117). In addition to other defenses made not pertinent herein, the Oklahoma Gas and Electric Company and the Fidelity & Casualty Company in that case alleged that the order of

the Corporation Commission and the decision and order of the Supreme Court of Oklahoma affirming said order were legislative and that said defendants were entitled to have the independent judgment of the court as to the law and facts as to their plea that said order was illegal and void in that it required the Oklahoma Natural Gas Company against its will and over its objection to supply gas as fuel directly to Wilson & Company when said Oklahoma Natural Gas Company had never professed to furnish gas to it or to any other consumer within the city gates or measuring stations either within or without the city limits of Oklahoma City, Oklahoma, and had not at the time of the making of said order or at any time prior thereto undertaken or professed to serve Wilson & Company, Inc., with gas or to serve any other consumer similarly situated, and said order constituted an appropriation of private property for public use without compensation and deprived the Oklahoma Natural Gas Company of its property without due process of law; and further that the order was null and void as to the defendant, Oklahoma Gas and Electric Company, for the reason that the same purported, under heavy fines and penalties, to require said Oklahoma Natural Gas Company to supply Wilson & Company, Inc., with gas instead of the same being supplied by the Oklahoma Gas and Electric Company; that the furnishing of such gas by Oklahoma Gas and Electric Company to said Wilson & Company, Inc., was profitable and remunerative to said Oklahoma Gas and Electric Company and the enforcement of said order would deprive it of its property, property rights and re-

munerative business without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and of Section 7, Article 2 of the Constitution of the State of Oklahoma (R. 118 to 121, inc.).

This answer further alleged that prior to and at the time of the making of said order of the Corporation Commission there was an oral contract existing between the defendant, Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, made several years prior thereto, and extending so long as the Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from the Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as Wilson & Company, Inc., with reference to Oklahoma City, said city gates and respective properties of the Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, and that therefore said order of the Corporation Commission was further illegal, invalid and void as impairing or attempting to impair the rights and obligations of and under said contract between said companies, all contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 10, Article I of said Constitution, and of Section 7, Article 2 of the Constitution of the State of Oklahoma.

Trial was had and a judgment was rendered in the District Court of Oklahoma County on the 5th day of April, 1933, against the Oklahoma Gas and Electric Company and The Fidelity & Casualty Company in the sum of $58,704.00 and against the Oklahoma Gas and Electric Company in the additional sum of $50,627.63.

On May 20, 1932, Case No. 1144 was dismissed in the Federal Court, without prejudice, and the instant case, from which this appeal was taken, was filed on the same day as Equity Cause No. 1357. In this action appellants also sought to enjoin Wilson & Company, Inc., from further prosecuting the suit in the District Court of Oklahoma County. A temporary restraining order was issued by Judge Vaught and the application for temporary injunction was heard by a three-judge court, as above stated, and on the 28th day of November, 1932, was denied (R. 63). The cause was finally heard before a three-judge court composed of Circuit Judge McDermott and District Judges Vaught and Kennamer. Thereafter a permanent injunction was denied, in a written opinion, and appellants' bill dismissed as heretofore stated.

It was shown at the final hearing that defendants in the State District Court had appealed from the judgment against them to the Supreme Court of the State.

SPECIFICATIONS OF ERROR

Appellants assigned the following errors, which will be urged here.

I. The said United States District Court for the Western District of Oklahoma committed error in dismissing the bill of complaint of complainants.

II. That said court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission of Oklahoma as a defense in the suit instituted by Wilson & Co., Inc., in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and its surety for the collection of the refund or overcharge based on the order of the Corporation Commission.

III. That said court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein.

IV. That said court erred in holding that the complainants, and each of them, are not entitled to an injunction herein.

V. That said court erred in refusing to expressly hold and conclude as a matter of law based upon its findings of fact and the evidence that the order of the Corporation Commission was null and void as to each of said complainants as depriving them, and each of them, of their property without due process of law, and denying them, and each of

them, the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and as impairing the obligation of the contract existing between the complainants, Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Corporation, as successor of the Oklahoma Natural Gas Company, contrary to and in violation of the provisions of Section 10 of Article I of said Constitution.

SUMMARY OF ARGUMENT

I.

Under the Constitution of Oklahoma, like that of Virginia, a legislative appeal lies to the Supreme Court of the State from legislative orders of its Corporation Commission, and that Court has power to substitute its own order and to grant a supersedeas pending the appeal.

Sections 20 to 24, Inc., Article IX, Oklahoma Constitution;

Atchison, T. & S. F. R. Co. v. *State*, 23 Okla. 510, 101 Pac. 262;

Chicago, R. I. & P. R. Co. v. *State*, 24 Okla. 370, 103 Pac. 617;

Atchison, T. & S. F. R. Co. v. *Miller*, 28 Okla. 109, 114 Pac. 1104;

Pioneer Tel. & Tel. Co. v. *City of Bartlesville*, 40 Okla. 583, 139 Pac. 694, 696;

City of Poteau v. *American Indian Oil & Gas Co.*, 159 Okla. 240, 18 Pac. (2d) 523;

Oklahoma Natural Gas Co. v. *Russell et al.*, 261 U. S. 290;

Prentis v. *Atlantic Coast Line*, 211 U. S. 210;

Oklahoma Gas & Electric Co. v. *Wilson & Co. et al.*, 54 Fed. (2d) 596.

Federal equity courts have jurisdiction to enjoin proceedings to enforce local statutes which are repugnant to the Constitution of the United States:

Ex parte Young, 209 U. S. 123;
Truax v. *Raich,* 239 U. S. 33;
Missouri v. *C. B. & Q. R. R. Co.,* 241 U. S. 533;
Terrace v. *Thompson,* 263 U. S. 197;
Prentis v. *Atlantic Coast Line, supra.*

Orders of a state administrative body are statutes within the contemplation of the above cases:

Oklahoma Natural Gas Co. v. *Russell et al., supra;*
Smyth v. *Ames,* 169 U. S. 466;
Prentis v. *Atlantic Coast Line, supra.*

A suit by a customer, through an assertion of alleged rights arising out of the Commissioner's order, is an attempt to enforce the order that may be enjoined by a court of equity:

Oklahoma Operating Co. v. *Love,* 252 U. S. 331.

The equity jurisdiction of the Federal Courts is not ousted unless appellants have a remedy at law in the Federal Courts:

City Bank Farmers Trust Company v. *Schnader,* 54 S. Ct. Rep. 259, — U. S. —;
Risty v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378;
Chicago & N. W. Ry. Co. v. *R. & W. Commission,* 280 Fed. 387;
North Pacific S. S. Co. v. *Industrial Accident Commission,* 23 Fed. (2d) 109;
Bohler v. *Callaway,* 267 U. S. 479, 45 S. Ct. 431;
Matthews v. *Rodgers,* 284 U. S. 521.

There was no remedy at law available to appellants in the State Courts to test the validity of the order of the Corporation Commission.

(a) The Corporation Commission under the Constitution and Laws of the State has exclusive jurisdiction to enforce the order.

Sections 20, 21 and 24, Article IX, Oklahoma Constitution;
Sections 3626 and 3627, Oklahoma Statutes 1931 (Sections 3470 and 3471, C. O. S. 1921);
Pioneer Tel. & Tel. Co. v. *State*, 40 Okla. 417, 138 Pac. 1033.

(b) The validity of the order of the Corporation Commission may be judicially tested by an injunction suit in equity in the courts of the State of Oklahoma.
Pioneer Tel. & Tel. Co. v. *State, supra.*

This equitable remedy provided by the state procedure does not defeat the equity jurisdiction of the Federal Court.
Bohler v. *Callaway, supra.*

The appellants have a right to test the order in a court of their choice.
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19;
Kansas City Southern Ry. Co. v. *Cornish et al.*, 65 Fed. (2d) 671.

II.

Under the findings of fact made by the court and the undisputed evidence in the record, Order No. 3388 of the Corporation Commission is null and void in that it endeavors to compel one public service corporation, Oklahoma Natural Gas Company, to assume and perform a public service which had never been professed or undertaken by it and to take business from another public service corporation, Oklahoma Gas and Electric Company, for which it had made substantial financial investments and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

An order of a State Corporation Commission requiring a public service corporation to supply gas to a consumer when it had never served or professed to serve it is repugnant to the Fourteenth Amendment to the Constitution of the United States.

Oklahoma Natural Gas Company v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401;

In re. Vance et al., and Oklahoma Natural Gas Company v. *Scott et al.*, consolidated, 115 Okla. 8, 241 Pac. 164;

Younts v. *Southwestern Tel. & Tel. Co.* (E. D. Ark.), 192 Fed. 200;

Southern Bell Tel. & Tel. Co. v. *Town of Calhoun* (W. D. So. Carolina), 287 Fed. 381;

United Fuel Gas Company v. *Public Service Commission*, 105 W. Va. 603, 144 S. E. 723;

Interstate C. C. et al. v. *Oregon-Washington Ry. & Navigation Co. et al.*, 288 U. S. 14, 77 L. ed. 310, 53 Sup. Ct. 266;

Wyoming Valley Water Supply Co. v. *Public Service Commission*, 104 Pa. S. 432, 159 Atl. 340.

The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of herein.

III.

The order is also null and void as impairing the obligation of a contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, which provided that as to consumers of gas within the city gates or measuring stations, so situated as Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, in contravention of Section 10, Article I of the Constitution of the United States.

Pond on Public Utilities, 3rd Ed., Section 901;

Ex parte City of Birmingham, 199 Ala. 9, 74 So. 51;

Wayne-Monroe Tel. Co. v. *Ontario Tel. Co.*, 112 N. Y. S. 424;

McKinley Tel. Co. v. *Cumberland Tel. Co.*, 152 Wis. 359, 140 N. W. 38;

Peoples Transit Co. v. *Henshaw*, 20 Fed. (2d) 87;

Texas & Pacific Ry. Co. v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266, 277;

Cumberland Telephone Co. v. *State ex rel. Attorney General*, 100 Miss. 102, 54 So. 670;
State Public Utilities Commission v. *Rombert*, 275 Ill. 432, 114 N. E. 191;
Winfield v. *Public Service Commission of Indiana*, 187 Ind. 53, 118 N. E. 531;
In re. Consolidated Gas Co. of N. Y., 106 N. Y. S. 407;
Attorney General v. *Consolidated Gas Co. of N. Y.*, 108 N. Y. S. 823.

The two companies were in no sense competitors at Oklahoma City or the vicinity thereof. They were each engaged in a different character of business there. The Oklahoma Gas and Electric Company had the distribution system and was serving consumers. The Oklahoma Natural Gas Company had the transportation system conveying the gas from the distant gas fields to supply same in wholesale quantities to the distribution company. Their undertakings were separate and distinct. The agreement in effect amounted to no more than that the Oklahoma Natural Gas Company would not at Oklahoma City profess to or undertake a service there which it had never professed or undertaken. It could, at its volition, refuse to profess or to undertake a particular service and be strictly within its legal rights. There could, of course, be no illegality in a contract coinciding with its rights without a contract.

IV.

The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein.

It is clear from the authorities that these appellants as well as the Oklahoma Gas and Electric Company have a right to maintain the action.

Oklahoma Gas & Electric Company v. *Wilson & Company et al., supra*;
Oklahoma Operating Company v. *Love, supra*;
Truax v. *Raich, supra*;
Terrace v. *Thompson, supra*;
Station WBT, Inc., v. *Poulnot, Sheriff et al.*, 46 Fed. (2d) 671;
Southern Pacific Terminal Co. v. *Interstate Commerce Commission and Young*, 219 U. S. 498.

Based upon the foregoing propositions of law, we contend that the three-judge court should have granted the injunction prayed for and that it erred in refusing so to do and in dismissing complainants' bill.

ARGUMENT

Proposition No. I.

The statutory three-judge court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission of Oklahoma as a defense in the suit instituted by Wilson & Company, Inc., in the District Court of Oklahoma County, Oklahoma, against said company and its surety for the collection of the refund or overcharge alleged to be due it because of non-compliance with the order of the Corporation Commission.

For convenience in presenting the argument the above proposition may be divided into two parts, which we shall designate A and B.

(A) The District Courts of the United States have equity jurisdiction to enjoin the order of a State Utility Commission wherein complainants assert its invalidity under the Constitution of the United States and such equity jurisdiction is not ousted where appellants have no remedy at law in the Federal Courts.

The plaintiffs in the bill filed in the United States District Court were public service corporations supplying gas in their respective fields of operation in Oklahoma to customers at rates established by the Corporation Commission of the State. Under the Constitution of Oklahoma, like that of Virginia, a legislative appeal lies to the Supreme Court of the state from legislative orders of its Corporation Commission, and that court has power to substitute its own order and to grant a supersedeas pending the appeal.

Sections 19 to 24, inclusive, Article IX, Oklahoma Constitution;

Oklahoma Natural Gas Co. v. *Russell et al.*, 261 U. S. 290;
Prentis v. *Atlantic Coast Line*, 211 U. S. 210;
City of Poteau v. *American Indian Oil & Gas Co.*, 159 Okla. 240, 18 Pac. (2d) 523;
Oklahoma Gas & Electric Co. v. *Wilson & Co. et al.*, 54 Fed. (2d) 596. (This case involved the identical order alleged in this suit to be unconstitutional.)

This was the holding of the court in the instant case.

The court, however, dismissed the bill and denied appellants herein relief on the ground that the plaintiff, Oklahoma Gas and Electric Company, could not maintain the action in equity because it had pleaded the invalidity of the order of the Corporation Commission in a state district court as a defense to the action brought by Wilson & Company, to recover from the Oklahoma Gas and Electric Company the difference in the sum paid it under its rates, and the sum it would have paid the Oklahoma Natural Gas Company if the order had been valid and no appeals had been taken. In this the appellants, and particularly appellant, Oklahoma Gas and Electric Company, contend that the lower court erred.

The universal rule is that the legal remedy, in order to defeat equity jurisdiction, must not only be adequate, but must be plain. The wording of the statute is that such remedy must be "plain, adequate and complete." U. S. C. A. 384, Title 28.

If the legal remedy is doubtful, equity has jurisdiction.

Union Pacific R. R. Co. v. *Weld County*, 247 U. S. 282, 38 S. Ct. 510;
Bohler v. *Callaway*, 267 U. S. 479, 45 S. Ct. 431.

The law is also well settled that the remedy at law, which would defeat the Federal Court's equity jurisdiction, must be an adequate remedy at law, on the law side of the Federal Court, available to the complainants.

In *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, at page 388, this Court says:

> "The remedy by appeal to the state court under Section 8469 does not appear to be co-extensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the Federal Courts, and the test of equity jurisdiction in a Federal Court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts."

Chicago & N. W. Ry. Co. v. *R. & W. Commission*, 280 Fed. 387.
North Pacific S. S. Co. v. *Industrial Accident Commission*, 23 Fed. (2d) 109.

It will be noted in *Chicago & N. W. Ry. Co.* v. *R. & W. Commission, supra*, the court says that the remedy must be one that plaintiff may resort to of his own volition, and not at the will of defendant. There was and is no possible action which the appellants here, complainants below, could have brought on the law side of the Federal Court to test the validity of the order, although there is present the federal question and the requisite jurisdictional amount. The suit in the State Court was brought by Wilson & Co. against

the Oklahoma Gas and Electric Company and the surety upon its bond, a surety corporation. The Oklahoma Gas and Electric Company is a domestic corporation, organized and existing under the laws of Oklahoma. The surety company is a foreign corporation, but was merely a surety upon the bond of the Oklahoma Gas and Electric Company, and, of course, as to it there existed no separable controversy. No federal question whatever appeared in the petition of the plaintiff in the State Court. Therefore, the case in the State Court could not have been removed to the Federal Court and a hearing afforded or remedy granted on the law side of the Federal Court docket.

The federal equity court has jurisdiction to enjoin proceedings in the State Court to enforce local statutes, which are repugnant to the Constitution of the United States.

Ex parte Young, 209 U. S. 123.
Truax v. *Raich*, 239 U. S. 33.
Missouri v. *C., B. & Q. R. R. Co.*, 241 U. S. 533.
Terrace v. *Thompson*, 263 U. S. 197.

Regulations made under the authority of a state enactment are statutes within the contemplation of the above cases.

Oklahoma Nat. Gas Co. v. *Russell et al., supra.*
Smyth v. *Ames*, 169 U. S. 466.
Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210.

A suit by a customer, through an assertion of alleged rights arising out of the Commission's order, is an attempt to enforce the order that may be enjoined by a court of equity. In *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, it was said:

> "The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders."

The appellants here do not have, and have never had, any possible way to litigate this matter upon the law side of the Federal Court. Therefore, appellants here have no remedy at law at all, as such term and expression is used and understood in the decisions relating to the equity jurisdiction of the Federal Courts.

As we understand the rule of law, it is that the state laws may provide a remedy at law, which would defeat the federal equity jurisdiction, but in order for the state remedy at law to defeat such jurisdiction, it must be plain and free from doubt, and must be such a remedy as the complainant could avail himself of in the Federal Court if the necessary federal jurisdictional matters exist. Such has been declared to be the law by this Court, even in cases to enjoin the collection of state taxes, in which character of cases there is applied to the fullest extent the rule that a suit in equity cannot be maintained in the Federal Courts where there is an adequate remedy at law.

Matthews v. *Rodgers*, 284 U. S. 521, 526.

From the foregoing authorities, it seems reasonably clear that the district court was in error in holding that the plea of the invalidity of the order of the Corporation Com-

mission as a defense in a State Court suit afforded the appellant, Oklahoma Gas and Electric Company, an adequate remedy at law which would defeat the equity jurisdiction of the Federal Court, but if any doubt existed it has been removed by the recent opinion of this Court in the case of *City Bank Farmers Trust Co.* v. *Schnader*, — U. S. —, 54 S. C. Rep. 259, decided January 8, 1934. This Court there said:

> "As the statutory remedy, if it be treated as an action at law, would lie only in the State Court and is not cognizable by the Federal Courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction."

(B) Under the Constitution and laws of the State of Oklahoma, as construed by its highest court, the validity of an order of its Corporation Commission, although affirmed by its Supreme Court in its legislative capacity, may not be adjudicated in any action at law in the state courts.

Assuming for the sake of argument only that a remedy at law in a state court could defeat the equity jurisdiction of the Federal Court, we shall now notice the state of the Oklahoma law to see if there was any remedy at law at all available to the appellants in the State Courts, and if so, was such remedy so plain and free from doubt as to measure up to the requirements of the federal statutes.

Here it may be observed that Oklahoma Packing Company (formerly Wilson & Co., Inc.), throughout this litigation in the State and Federal Courts, has taken the position that the state district court did not possess the power to inquire into and adjudicate the validity of the order of

the Corporation Commission because of the provisions of Section 20, Article 9 of the Constitution and particularly the following:

> "No court of this State (except the Supreme Court, by way of appeals as herein authorized) shall have jurisdiction to review, reverse, correct, or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties. * * *"
> (Full section is set forth in the appendix to this brief.)

Appellants also have consistently contended and now contend that the District Court of Oklahoma County was without jurisdiction to review or adjudicate said order of the Commission for several reasons, presently to be stated. It is our further contention that under the Constitution and laws of the State of Oklahoma and the decisions of its Supreme Court, there was no remedy at law at all available to the appellants in the State Courts. Sections 19 to 24, inclusive, of Article IX of the Oklahoma Constitution appear in the appendix to this brief. These provisions of the State Constitution provide for the granting of an appeal, the awarding of a supersedeas, and the giving of a bond to the State of Oklahoma in sufficient amount to insure prompt refund by the appealing party of the charges that appellant may collect pending the appeal in excess of those fixed by the Commission. They also confer on the Commission power to require the appealing party to keep accounts and to make verified reports to the Commission showing the amounts being charged by appellant pending the appeal in excess of the rates fixed by the Commission, and the names

and addresses of the persons to whom such charges would be refunded in case the order is affirmed on appeal. It is also provided that the Commission may require additional security whenever it thinks it necessary to insure the prompt refunding of such overcharges, and that all amounts collected by appellant pending such appeal, in excess of those authorized, shall be promptly refunded by the appellant to the parties entitled thereto, in such manner and through such methods of distribution as may be prescribed by the Commission or by law.

Pursuant to these provisions of the Constitution, the Oklahoma Legislature, on February 10, 1913, enacted a law (see Sections 3626 and 3627, Okla. Stat. 1931, set forth in the appendix) providing the manner of the collection of such refunds and the distribution thereof. This Act confers upon the Commission the power to determine not only the amount of the refunds and the parties entitled thereto, but also to render judgment against the appealing party for such overcharge. It further provides that when such refund is collected it shall be paid immediately by the Commission to the parties to whom it is due.

There is no other provision of law dealing with the subject, and, therefore, the constitutional provision and the statute enacted pursuant thereto, give sole jurisdiction to the Corporation Commission to determine not only the amount, but the person or persons to whom such rebate should be paid. No other provision having been made by the Commission, or the law-making body, the jurisdiction of the Commission to determine said matters is necessarily exclusive, the general rule being that where a power or

authority is given to one body, board or tribunal, the same is exclusive.

State ex rel. Haskell v. *Huston,* 21 Okla. 782.
Martin v. *Mott,* 12 Wheat. 19, 6 L. ed. 537.
Conroe v. *Bull,* 7 Wis. 354.
State v. *Hastings,* 10 Wis. 468.
People v. *Navarre,* 22 Mich. 1.

The suit by Wilson & Co. in the State Court is essentially one to collect the refund or overcharge paid by it for gas in excess of the sum which would have been payable at the rates fixed in said Order No. 3388. This is made entirely clear when it is observed that approximately one-half of the sum sued for by Wilson & Co. is for refund or overcharge without bond securing the payment thereof. The Supreme Court of Oklahoma, in *Pioneer Tel. & Tel. Co.* v. *State,* 40 Okla. 417, 138 Pac. 1033, declares positively that the suit for the overcharge is but a proceeding to collect the refund, regardless of whether or not bond was given to secure payment of all or any part of such excess charge. The Court says:

> "Had the appellant appealed from the order of October 12, 1908, and executed a supersedeas bond to cover the refund of excess charges in the event the appeal was finally decided against the appellant, and the final decision of such appeal had been against the appellant, it would have been the duty of the appellant to promptly refund, to the parties entitled to such excess charges, the same in such manner and under such methods of distribution as may have been prescribed by the Corporation Commission. * * * The refunds are to be collected and distributed 'in such manner and through such methods of distribution as may be prescribed by the Commission or by law.'"

And:

"The Act of February 10, 1913, *supra,* constituted the Corporation Commission a court of record with jurisdiction to entertain such action. The fact that a supersedeas bond was not given did not deprive the State of the right to maintain such action."

Under the Oklahoma law all such refunds or overcharges are due from the utility to the Commission, and not to the rate-payers direct. The utility by paying to the Commission the amount of refunds fixed by the Commission discharges its liability and cancels the lien on its property, and such is the only manner and method provided under the laws of Oklahoma. Thus it seems clear that the District Court of Oklahoma County was and is without jurisdiction of the subject-matter of the suit brought by Wilson & Company, now Oklahoma Packing Company.

Section 24 of Article IX of the Constitution of Oklahoma specifically prohibits on its face the contesting of the validity of an order of the Commission in a judicial proceeding in any of the courts of the state.

In the case of *Pioneer Tel. & Tel. Co.* v. *State, supra,* in construing the above provisions of the Oklahoma Constitution and the enactment of the Legislature of 1913, the Supreme Court of Oklahoma in an opinion by Judge Williams, now United States District Judge, Eastern District of Oklahoma, said:

"Three remedies were available to the appellant by which the validity of said order might be challenged: (1) By appeal as provided in Section 20 of Article 9 (Section 238, Williams' Ann. Ed.) of the Constitution;

(2) by application made directly to the Commission to set aside order (Section 18 of Article 9 [Section 234; Williams' Ann. Ed.]) of the Constitution; and (3) by an action in equity to restrain its enforcement."

In the opinion the court also declares in positive terms that in any event the utility has available to it an equity action in the courts of general jurisdiction in Oklahoma, using this language:

"Following the rule laid down in the Prentis case, we have no other alternative than to hold that, by virtue of section 6 of the Bill of Rights, the direct proceeding in a court exercising equity powers in the district and superior courts of this state was available to appellant to challenge the validity of the order."

And further:

"In this action (an action before the Commission, to collect refunds) the state acts for the individual, and said section 24 specifically prohibits the reasonableness of the order upon which the action is based, being brought into question in such action. Said section 24 of article 9, therefore, cuts off the right of a judicial review as to the validity of said order, in an action brought to enforce the refund, but the right to invoke equity jurisdiction by the transmission company to have said order declared invalid is not denied, for such proceeding is not collateral but direct."

This decision of the Supreme Court of Oklahoma was rendered long prior to the commencement of the action by Wilson & Company in the State Court, and has not been overruled by any later decisions of the Oklahoma Supreme Court. It was handed down in 1914, and thus has remained the law of Oklahoma for a period of nineteen years. This

rule has been re-announced by the Supreme Court of Oklahoma in the recent case of *Russell Petroleum Co.* v. *Walker*, 162 Okla. 216, 19 Pac. (2d) 582.

An equitable remedy provided by the state procedure does not defeat the equity jurisdiction of the Federal Court.

Bohler v. *Callaway*, 267 U. S. 479.

Under the state authorities it seems entirely clear that the District Court of Oklahoma County was without jurisdiction of the subject-matter in the first instance to entertain the action of Wilson & Company. However, the Oklahoma Gas and Electric Company was pressed to the point of answering in the case in the District Court of Oklahoma County. Faced with this difficulty it answered and, among other defenses, questioned the validity of the order of the Commission upon substantially the grounds set forth in its bill filed in the Federal Court.

It is obvious that at the time the complainants filed their bill in the Federal Court, there was no remedy at law in the State Court; at least the existence of such a remedy was not plain and free from doubt and, therefore, would not operate to defeat federal equity jurisdiction.

Union Pacific R. R. Co. v. *Weld County*, 247 U. S. 282.

The legislative action of the state having become complete with the affirmance by the Supreme Court of Oklahoma of the order of the Commission, the appellants had and have a right to their choice of courts, and to exercise that choice by seeking an adjudication of the validity of said order by

this suit in equity in the Federal Courts. Appellants exercised their choice by the institution of the case at bar.

Kansas City-Southern Ry. Co. v. *Cornish et al.*, 65 Fed. (2d) 671.

There was no question of comity in the situation presented.

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, at pages 39 and 40, this Court says:

> "At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticize that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens* v. *Virginia*, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal Court. The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied. *In re. Metropolitan Railway Receivership*, 208 U. S. 90-110; *Prentis* v. *Atlantic Coast Line et al.*, 211 U. S. 210."

From the foregoing provisions of the Oklahoma Constitution and the decisions of its Supreme Court, the conclusion is inevitable that such equitable proceeding must

take precedence over and be heard before any suit for the collection of the refund or overcharge. It matters not in what stage the proceeding for the collection of a refund or overcharge may be, such proceeding must be immediately halted and enjoined upon the institution of said equity proceeding. The right given the utility to test the validity of the order only in an equity proceeding bestowed in positive and mandatory terms by the Oklahoma law would be vain if the utility did not get its hearing in the equity proceeding on the validity thereof until after the rate-payer had, perchance, obtained judgment and collected upon execution thereon from the utility in a refund action in which the utility could not question the validity of the order. It would then be too late to secure practical relief.

Proposition No. II.

Under the findings of fact made by the court and the undisputed evidence in the record, Order No. 3388 of the Corporation Commission is null and void in that it endeavors to compel one public service corporation, Oklahoma Natural Gas Company, to assume and perform a public service which had never been professed or undertaken by it and to take business from another public service corporation, Oklahoma Gas and Electric Company, for which it had made substantial financial investments and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

The circumstances in this case are such that we hope the Court will agree with us that it is desirable to dispose finally of the case to save the expense and delay of further litigation. In this connection we desire to point out that

the proceedings before the Corporation Commission were commenced on November 13, 1925, and that the Order involved herein was made by the State Corporation Commission on the 13th day of April, 1926. Moreover the three-judge court heard all of the evidence offered by the parties and made its findings of fact, and all that remains to be done is to declare the law upon the undisputed evidence and facts so found.

As stated by the three-judge court, the question presented is: "Whether an order made by the Corporation Commission of Oklahoma in 1926, requiring the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas, is valid. The validity of the order, in turn, depends upon the question of whether the Oklahoma Natural Gas Company had professed or undertaken to serve Wilson & Company, Inc., or others similarly situated. The parties agree, and the law undoubtedly is, that no power resides in the state to compel a utility to furnish service to that part of the public which it has not professed or undertaken to serve. The controversy narrows to the question of whether the Oklahoma Natural Gas Company had undertaken to serve others of the public situated similarly to Wilson & Company, Inc. * * *"

At the inception of the argument on this proposition, we wish to advert to a circumstance that has inadverdently caused some confusion in the course of this litigation. The Corporation Commission in its order erroneously stated that the Oklahoma Natural Gas Company had assumed the obligation of supplying gas for use in Oklahoma City and

vicinity, and the Supreme Court of Oklahoma, in its opinion, inadvertently found that it had been supplying gas in Oklahoma City. Its legislative order affirming the decision of the Corporation Commission is based largely upon this erroneous statement. In the opinion denying the temporary injunction in this case the United States District Court fell into a similar error. It stated in the opinion that the Oklahoma Natural Gas Company had never supplied gas to consumers in Oklahoma City, but that it had to consumers within the territory between the city limits and the gates or measuring stations, although there was no evidence in the record to this effect. On the final hearing the court found, in accordance with the record, that the Oklahoma Natural Gas Company had never supplied gas to consumers within the gates, either within or without the city limits.

It may be conceded for the purpose of this discussion that if the Oklahoma Natural Gas Company had actually undertaken to serve gas to consumers within Oklahoma City or within the city gates or measuring stations at Oklahoma City, it could not abandon such service without the permission of the Corporation Commission and that an order of that body requiring it to resume a public service once undertaken would be valid; but the evidence in this case and the findings of fact of the three-judge court, as well as the findings of fact of the District Court of Oklahoma County, show that the Oklahoma Natural Gas Company had never undertaken such service. This presents an entirely different situation and calls, in our opinion, for an entirely different legal conclusion from that arrived at by the Supreme Court of Oklahoma.

The three-judge court found (Finding of Fact IV) that:

> "The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of."

And in accordance with the written stipulation of the parties the three-judge court also found in the latter part of Subdivision 3 of Finding I:

> "The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas & Electric Company, who was purchasing all its gas from the Oklahoma Natural Gas Company."

We have here a positive finding that the Oklahoma Natural Gas Company never served or professed to serve gas to consumers within the city gates at Oklahoma City or the vicinity thereof. From this finding we shall hereinafter show that it necessarily follows as a matter of law that the order of the Corporation Commission is null and void. In addition to the findings of the trial court, the undisputed evidence in this case shows that the Oklahoma Natural Gas Company never, at any time supplied nor offered to supply, industrial users in the vicinity of Oklahoma City, either prior to the order of the

Corporation Commission in June, 1921, abrogating the contractual relations theretofore existing between the two companies and providing for the gas to be metered and sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company at the point of delivery, or at any time subsequent to the making of said order. The evidence showed, without dispute, that prior to the entry of the gate rate order in June, 1921, the Oklahoma Gas and Electric Company, under the old contracts between it and the Oklahoma Natural Gas Company abrogated by that order, supplied gas to all users at Oklahoma City, both within the city limits and without the city limits within five miles of Oklahoma City. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and to measure, sell and deliver gas to the Oklahoma Gas and Electric Company at said gates, there were a few consumers of gas (all of them domestic consumers) outside of and beyond the locations of the gate stations who were being supplied by the Oklahoma Gas and Electric Company at the time of the making of the order, and in carrying out said order it was agreed between the two companies, with the assent of the Oklahoma Corporation Commission, that the Oklahoma Natural Gas Company could, if it elected, continue to supply gas to such consumers outside of the gates, and the Oklahoma Natural Gas Company did in fact supply these consumers after the making of the gate rate order. (Subdivision 3, Finding 1).

From the above findings of fact and the evidence in the record, it conclusively appears that the Oklahoma Nat-

ural Gas Company never served nor professed to serve industrial users of gas in the vicinity of Oklahoma City, and it was never the purpose of said company to furnish natural gas in competition with its customers in the vicinity of any city or town where it sold its gas to a distributing company, although it did propose to sell industrial gas to consumers on its lines near cities where it owned and operated the gas distribution systems in said cities. Pursuant to such profession it served only a customer or two adjacent to Tulsa and two or three adjacent to Sapulpa, in both of which cities it owned and operated the distribution systems. This Court will, of course, take judicial knowledge that these cities are a hundred miles or more from Oklahoma City.

The sale by the Oklahoma Natural Gas Company of its gas to the Oklahoma Gas and Electric Company was completed by the delivery of such gas to the latter company at said gates or measuring stations whereupon such gas became the property of the Oklahoma Gas and Electric Company, and the Oklahoma Natural Gas Company had no gas to deliver or means of delivering the same to anyone inside the gates or measuring stations.

The Supreme Court of Oklahoma has definitely laid down the rules with respect to the obligation of a public service corporation to undertake new and additional public service.

In the case of *Oklahoma Natural Gas Company* v. *Corporation Commission et al.*, 88 Okla. 51, 211 Pac. 401, the Corporation Commission of the State, at the instance of a

local gas company serving the City of Chickasha, Oklahoma, entered an order requiring the Oklahoma Natural Gas Company to furnish and supply gas to this local company for distribution in Chickasha. The Oklahoma Natural Gas Company was a public service corporation then furnishing natural gas to thirty-five or forty cities and towns in Oklahoma. It had franchises in some of these cities and delivered gas to local distributing companies for distribution in other cities. It had a large transmission line passing four and one-half miles from the city limits of Chickasha. The local distributing company in Chickasha constructed a gas pipe line to the line of Oklahoma Natural Gas Company and demanded that the Oklahoma Natural Gas Company furnish the gas, on the theory that the Oklahoma Natural Gas Company had undertaken the public duty of serving other distribution companies in similarly situated cities and towns that were located near its transmission lines. In holding that the Oklahoma Natural Gas Company had not undertaken or professed to serve either the City of Chickasha or the State of Oklahoma at large merely because it had elected to furnish gas to local distributing companies in certain cities and towns, and in reversing and annulling the order of the Corporation Commission of the State, the Supreme Court of Oklahoma said:

> "But the appellant has not undertaken or professed to serve the City of Chickasha, neither does it profess to serve the state at large. The fact that it is a public utility does not necessarily cast upon it the duty of serving the public at large. This duty is not to all men, but to a certain public limited by its profession. Wyman on Public Service Corporations, Sec. 344; and,

while the Corporation Commission may within constitutional and reasonable limitations compel appellant to extend its service within the boundaries of those cities it is now serving, or those it may undertake to serve, it is without power or authority to compel appellant to serve a city not included within its profession of service. To compel the appellant to extend its service to a city, town or community it has not undertaken or professed to serve, and which it does not desire to serve, is tantamount to an appropriation of private property for public use without just compensation. *Atchison, T. & S. F. Ry. Co.* v. *Railway Commission of California*, 173 Cal. 577, 160 Pac. 828, 2 A. L. R. 975; *State ex rel. Ozark Power & Water Co.* v. *Public Service Comm. of Missouri*, 287 Mo. 522, 229 S. W. 782. While the appellant is employing its resources and property in a public service, it must be remembered that these still remain its private property, and that the public cannot assume the role of general manager, and require such property to be used in a service to which the owner has not voluntarily dedicated it. *Interstate Commerce Commission* v. *Chicago, Great Western R. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705.

"'To hold that the Corporation Commission had the authority to compel the appellant to extend its service to include communities it has never professed to serve, and does not desire to serve, is, in effect, to say that the business policy of appellant, in this regard, may be wrested from the board of directors and lodged with the Commission. Obviously this was never contemplated. The stockholders and directors of appellant had the right to determine for themselves whether they would obtain gas from and build their pipe line to the Duncan field, and the conditions upon which they would do so, and, appellant having obtained said gas and built

said line solely for the purpose of adequately supplying that portion of the public it was bound to supply, it should not be required to divert its gas supply from that purpose.' "

The Supreme Court of Oklahoma considered a similar question and prescribed more definite limitations on the obligations of a public service corporation to assume and perform public service theretofore not undertaken in the case of *In re. Vance et al. and Oklahoma Natural Gas Co.* v. *Scott et al., consolidated,* 115 Okla. 8, 241 Pac. 164. An examination of that case discloses that complainants in the Vance case owned property abutting the west side of a highway and that a two-inch pipe line of the Oklahoma Natural Gas Company was constructed along the east side of the highway and that the property of the complainant in the other case was some 1,600 feet from the pipe line of the Oklahoma Natural Gas Company, but did not abut the highway. The Oklahoma Natural Gas Company (one of the appellants in the instant case) did not have a franchise in Oklahoma City, but owned and operated gas lines leading to measuring stations in the vicinity of Oklahoma City, where it metered gas at wholesale, but it supplied gas to the owners of property crossed by its pipe line on the east side of the highway, pursuant to the commands of Section 7904, C. O. S. 1921. The facts in that case further disclose, as they do in the instant case, that the Oklahoma Gas and Electric Company, which at that time distributed gas in Oklahoma City, had prior to 1921 furnished gas to a few persons living along the road in front of the property belonging to the complainants on the west side of the highway, but discontinued such service after the gate

rate order, and that these parties were thereafter supplied gas by the Oklahoma Natural Gas Company pursuant to an agreement between the two companies with the assent of the Corporation Commission. The persons living on the west side of the highway and the other complainant instituted an action before the Corporation Commission of Oklahoma to compel the Oklahoma Natural Gas Company to extend its lines and deliver gas to each of them on the theory that it was obligated to do so because it was supplying gas to owners of property crossed by its lines and to the former customers of the Oklahoma Gas and Electric Company. The Corporation Commission entered its orders respectively compelling the company to extend this service to these prospective domestic users. The Supreme Court of Oklahoma on appeal held that the supplying of gas to people on the side of the highway crossed by its lines, because of the legal or statutory duty to supply such gas and the service to the former customers of the Oklahoma Gas and Electric Company, did not constitute a profession or undertaking to serve other people in that community not so situated, even though the company's pipe line was in close proximity to the properties of the applicants. That Court, in reversing the order of the Commission, in the first paragraph of the syllabus, held:

> "The Corporation Commission has no authority to require a public utility to furnish natural gas to people living outside the city limits where the utility has never professed or undertaken to serve the people of that community generally, even though it may appear that the gas company has a pipe line in close proximity to the property of such persons."

The facts in that case disclose a much stronger case in favor of the validity of the order of the Commission than exists in the present case. There the Oklahoma Natural Gas Company not only professed to, but was actually supplying gas to domestic consumers within one hundred feet of the residences of the applicants living across the highway. The Court held in effect, however, that the company's profession of service was to a limited number in a particular situation, and was not to the public generally, and that there was no obligation imposed upon the company to render service beyond its profession.

In the opinion in this case, the Supreme Court of Oklahoma stated:

> "It is well settled that where the gas company has a franchise to furnish gas to the people of a municipality, and by virtue of the franchise uses the streets of the city, it is obligated to furnish gas to all of the inhabitants of such city and can be required to make reasonable extensions of service by the Corporation Commission. A very different question arises where it is sought to compel the gas company to render service beyond the limits of a municipality. The property belonging to the complainants is not within the limits of any city or town served by the Oklahoma Natural Gas Company under a franchise, and its duty to furnish gas to these complainants cannot be determined under the cases referred to in the brief of counsel for the Commission, which cases, for most part, deal with franchise obligations."

These authorities are in accord with the legal principles governing the obligation and duty, and protecting the rights of public service corporations in all jurisdic-

tions. In the case of *Younts* v. *Southwestern Tel. & Tel. Co.* (E. D. Ark.), 192 Fed. 200, an individual sought, after making application to the telephone company for service, to obtain a judgment and penalties under an Arkansas statute which required telephone companies to supply all applicants with facilities without discrimination and partiality. The telephone company refused to serve the applicant, although he offered to construct a line to the telephone company's existing lines, and although the telephone company was serving other residents outside the city of Little Rock. The Court held that a telephone company, operating an exchange within the corporate limits of a city, was under no obligation to extend its lines beyond the corporate limits of the city, and that where it did so for the accommodation of one or two persons, such action did not entitle another outside resident to demand the same service and that a refusal to comply with such a demand did not constitute an unlawful discrimination within the meaning of the Arkansas statutes.

Order No. 3388, in the instant case, sought to, and did, by its terms, compel the Oklahoma Natural Gas Company to give service to Wilson & Co., Inc., of Oklahoma, at its manufacturing plant, just outside the city limits of Oklahoma City, but immediately adjacent thereto, and inside the measuring stations, and on the lines of the Oklahoma Gas and Electric Company, which had a franchise in Oklahoma City and was serving not only the inhabitants of said city, but those in the community and vicinity thereof. The Oklahoma Natural Gas Company had no legal duty to supply gas in or around Oklahoma City created by

contract or statute, save and except in cases where its transmission lines crossed private property. Although it supplied gas to a few domestic consumers located on its lines beyond the city limits of Oklahoma City, all of said consumers were beyond the city gates and measuring stations where the gas was metered and sold to the Oklahoma Gas and Electric Company and were therefore not in a similar situation to Wilson & Co. as it was situated within the gates and on the lines of the Oklahoma Gas and Electric Company and was not a so-called domestic consumer, but an industrial consumer, because of the large quantities of gas required by it. As held by the Supreme Court of Oklahoma in the foregoing case, a profession to supply gas to certain homes in a particular and special situation imposed no obligation upon the Oklahoma Natural Gas Company to supply gas to a consumer which was in an entirely different situation.

In the case of *Southern Bell Tel. & Tel. Co.* v. *Town of Calhoun* (W. D. South Carolina), 287 Fed. 381, an act of the Legislature of South Carolina requiring the telephone company to install and maintain exchanges in certain towns and cities in the State, was held to be invalid for the reason that its enforcement would deprive the telephone company of constitutional rights and guaranties under the Fourteenth Amendment.

And in this case, if the Corporation Commission of Oklahoma could compel the Oklahoma Natural Gas Company to undertake to serve Wilson & Co., Inc., of Oklahoma, then being served with natural gas by the Oklahoma Gas and Electric Company, it could require the Oklahoma Nat-

ural Gas Company to furnish service to every industry in the State of Oklahoma, located outside the corporate limits of any city or town, if such industry would acquire or construct a pipe line connecting with the transmission and supply lines of the Oklahoma Natural Gas Company. Obviously, the contention that such power resided in the Corporation Commission would be absurd and ridiculous.

In the case of *United Fuel Gas Co.* v. *Public Service Commission*, 105 W. Va. 603, 144 S. E. 723, an order of the Public Service Commission of West Virginia was before the Supreme Court of that State for review. Three or four applicants had applied to the United Fuel Gas Company for natural gas service from a line located about three-fourths of a mile from the applicants' residences. These applicants resided in rural communities and outside of cities and towns. The United Fuel Gas Company extended gas service to these dwelling houses and furnished gas to them. Some ten years later the United Fuel Gas Company served notice upon five consumers that it proposed to discontinue the gas service, and these consumers sought an order from the Public Service Commission to compel the company to continue the service. The Commission entered an order preventing the gas company from discontinuing the service. The Supreme Court of West Virginia reversed this order, and quoted with approval from the decision of the Supreme Court of Oklahoma in *In re. Vance, supra*, and from the decision of the United States District Court for the Eastern District of Arkansas in *Younts* v. *Southwestern T. & T. Co., supra*. It will also be noted that although the United Fuel Gas Company extended special service to some of the complaining persons who lived outside the limits

of the territory where it was contractually bound to furnish service, it was not obliged to furnish like service to others outside such territory. Under the authority of this case, even if Wilson & Co. were located beyond the city gates or measuring stations and were in the same territory as others supplied, there would be no legal liability to serve it.

It is apparent that the voluntary and optional supplying of gas by the Oklahoma Natural Gas Company to a few industries in or near Tulsa and Sapulpa, which cities were 100 miles or more distant from Oklahoma City and in which the Oklahoma Natural Gas Company was contractually bound by franchise to serve, could not and did not constitute a public profession to supply all industries and all persons located anywhere in the State of Oklahoma. The situations were entirely dissimilar.

In our opinion this Court has recently re-announced the legal propositions for which we contend in the case of *Interstate C. C. et al.* v. *Oregon-Washington Rd. & Navigation Co. et al.*, 288 U. S. 14, 77 L. ed. 310, 53 Sup. Ct. 266. While this case involved the public duty of a railroad carrier, the legal principle, in our opinion, is the same. In affirming the decision of the District Court of the District of Oregon enjoining the enforcement of an order of the Interstate Commerce Commission ordering the railroad company to build a line approximately 185 miles in length, this Court, after reviewing many state decisions, said:

> "Those decisions show that due process is denied by requiring service which goes beyond the undertaking of the carrier. * * *. No extension ordered for the ever the State attempted to enforce a regulation or service of new territory had been approved. When-

> demand extension of facilities outside the company's undertaking to serve the public, the power was negatived for the very reason that the attempted exercise called on the railroad company for something beyond its agreement."

In connection with the above statement of the law, this Court made the additional statement, in note 20 of the footnotes to the decision:

> "See the cases passing on State Commission orders, cited *supra*, notes 12 and 13; also those cited in note 24, *infra*. The same rule has been applied in the case of other public service corporations. Gas or electric light or telephone companies may be compelled to extend their facilities within the territory covered by the franchises granted them: *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 38 S. Ct. 122, 62 L. ed. 337; *New York ex rel.* v. *Public Service Commission*, 269 U. S. 244, 46 Sup. Ct. 83, 70 L. ed. 255. But they may not be compelled to extend their lines beyond these limits or to serve other communities. *Southern Bell Ser. Comm.*, 287 Mo. 522, 229 S. W. 782; *Oklahoma Nat. Gas Co.* v. *Corp. Comm.*, 88 Okla. 51, 211 Pac. 401, 31 A. L. R. 330; *United Fuel Gas Co.* v. *Pub. Ser. Comm.*, 105 W. Va. 603, 144 S. E. 723."

It will be noted that this Court has apparently put its approval upon the decision of the Supreme Court of Oklahoma in the case of *Oklahoma Natural Gas Co.* v. *Corporation Commission, supra*, and indirectly upon the opinion of the Supreme Court of Oklahoma in the case of *In re. Vance et al.*, 115 Okla. 8, 241 Pac. 164, by citing the case of *United Fuel Gas Co.* v. *Public Service Commission, supra*, which is largely based upon the opinion of the Supreme Court of Oklahoma in the Vance case.

We think these salutary principles are applicable in the instant case. If the Oklahoma Corporation Commission could compel the Oklahoma Natural Gas Company to interfere with the established business of its valuable and largest customer by an enforced business in a field which it has never professed to serve, it would deprive the Oklahoma Gas and Electric Company, as well as the Oklahoma Natural Gas Company, of its property and property rights without due process of law. The extent of its commitment was to serve only those industries outside of and beyond city gates in the immediate vicinity of cities and towns where it owned and operated the local distribution systems as well as transported the gas for delivery to said systems. Admittedly the Oklahoma Natural Gas Company had the right to supply gas without a franchise to industries within the State situated outside of towns and cities, but there is a vast distinction between the right of a corporation to engage in business in a certain territory and a legal obligation to engage and carry on business in such territory. We quote further from the opinion of this Court in the Oregon case:

> "The Oregon-Washington Company chose not to serve the territory which the cross-state line would reach; has not desired and does not now desire to enter upon the project. The possession of a charter which would have made the building of a railroad legal is insignificant as to the company's actual undertaking. Whether the railroad held itself out to serve the region in question must be decided in the light of all the facts. The record demonstrates that the territory to be traversed was one the company had neither actually nor impliedly agreed to serve with transportation facilities."

See:

Wyoming Valley Water Supply Co. v. *Public Service Commission,* 104 Pa. S. 432, 159 Atl. 340.

A perusal of the court's findings of fact and the evidence in the record can leave no room for argument as to what the facts were on April 13, 1926, when the order was made, and on November 13, 1925, when the application was filed with the State Corporation Commission. An application of the plain legal principles above discussed to these facts, it seems to us, must compel the conclusion that the order of the Corporation Commission of Oklahoma was wholly beyond and outside its powers, and that its enforcement in any manner would directly deprive these complainants of their property and property rights without full compensation and without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution, and the contract between the two companies with respect to their distinct and several fields of service would be thereby impinged, in violation of Section 10, Article I of said Constitution.

Proposition No. III.

The order is also null and void as impairing the obligation of a contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, which provided that as to consumers of gas within the city gates or measuring stations, so situated as Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, in contravention of Section 10, Article I of the Constitution of the United States.

The three-judge court in its finding No. 2 found in accordance with paragraph 7 of the bill, admitted by paragraph 17 of the answer, that prior to and at the time of making the order complained of an oral contract was made between the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company providing that consumers within the gates or measuring stations in Oklahoma City and in the vicinity thereof should be supplied gas by Oklahoma Gas and Electric Company and would not be furnished or supplied by the Oklahoma Natural Gas Company. This arrangement was a practical one and in accordance with the public interest.

Since the Oklahoma Gas and Electric Company held a franchise in Oklahoma City and had constructed its distribution lines not only to supply all applicants within the city limits—the territory covered by its franchise—but had also constructed its lines beyond the city limits in order to supply gas to all those within the community of the city, it

was necessary to have the city gates or measuring stations placed beyond the legal limits of the city and beyond its distribution lines in order that the gas sold to it by the Oklahoma Natural Gas Company could be metered and charged to it before passing into its distribution system. It was the company that had the equipment, organization and facilities to operate the distribution system and to supply gas to all within the territory it had professed and undertaken to serve. On the other hand, the Oklahoma Natural Gas Company did not have such facilities except in the cities and towns where it owned and operated the distribution systems. The two companies were in no sense competitors in the supplying of gas in Oklahoma City or the vicinity thereof. Their undertakings were separate and distinct. The one was transporting and selling gas at wholesale at the city gates to the distributing company, and the other was engaged in supplying gas to homes and industries within city gates.

Pond on Public Utilities, 3rd ed., Sec. 901.

Ex parte City of Birmingham, 199 Ala. 9, 74 So. 51.

Wayne-Monroe Telephone Co. v. *Ontario Telephone Co.,* 112 N. Y. S. 424.

McKinley Telephone Co. v. *Cumberland Telephone Co.,* 152 Wis. 359, 140 N. W. 38.

People's Transit Co. v. *Henshaw,* 20 Fed. (2d) 87.

T. & P. Ry. Co. v. *Gulf, etc., Ry. Co.,* 270 U. S. 266, 277.

Cumberland Telephone Co. v. *State ex rel. Attorney General,* 100 Miss. 102, 54 So. 670.

State Public Utilities Commission v. *Rombert,* 275 Ill. 432, 114 N. E. 191.

Winfield v. *Public Service Commission of Indiana*, 187 Ind. 53, 118 N. E. 531.
In re Consolidated Gas Co. of New York, 106 N. Y. S. 407.
Attorney General v. *Consolidated Gas Co. of N. Y.*, 108 N. Y. 823.

Proposition No. IV.

The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein.

The Circuit Court of Appeals for the Tenth Circuit in an opinion by Judge Cotteral held that both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company had a right to maintain this equitable action and to have the independent judgment of the court upon both the law and the facts (54 Fed. (2d) *supra*), but the three-judge court, in the instant case, in the opinion by Circuit Judge McDermott held that the Oklahoma Natural Gas Company had no substantial interest in the controversy. We think this was error.

In the case of *Oklahoma Operating Co.* v. *Love, supra,* in speaking of the remedy by injunction against the enforcement of the Corporation Commission's order therein involved, this Court stated that if the rates were found to be confiscatory that a permanent injunction should issue to restrain their enforcement "either by means of penalties or

otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders."

We think that the right to maintain the action by both plaintiffs is amply sustained by the decisions of this Court in the following cases:

Truax v. *Raich*, 239 U. S. 33, 37, 36 S. Ct. 7, 60 L. ed. 131.

Terrace v. *Thompson*, 263 U. S. 197, 214, 44 S. Ct. 15, 68 L. ed. 655.

In the recent case of *Station WBT, Inc.*, v. *Poulnot, Sheriff et al.*, 46 Fed. (2d) 671, it appears that a radio broadcasting station brought a suit attacking the constitutionality of a state law imposing a state tax on radio receiving sets and invoking the principle that the constitutionality of a law cannot be attacked by one who is not directly affected by the act, it was claimed that the radio broadcasting station was not authorized to allege the unconstitutionality of the state law. A three-judge court, composed of Parker, Circuit Judge, and Cochran and Glenn, District Judges, held that the result of such a tax imposed on radio receiving sets was to impair the value of the business of broadcasting stations, and, if the amount of the tax should be increased, the business might be destroyed entirely, so that the property rights were directly affected by the tax in question.

Under the same principle, if the Corporation Commission could take one customer away from the Oklahoma Gas and Electric Company by an illegal or invalid order, it could take all customers away from the Oklahoma Gas and

Electric Company by other illegal and unlawful orders and thereby destroy entirely its business. On the other hand, if the Commission could compel the Oklahoma Natural Gas Company to serve one industry in the State where it had not professed to serve, it could compel it to serve all industries, thereby imposing upon it a financial burden it not only had not undertaken, but could not bear.

Even though necessity for compelling enforcement of the order might have ceased as to the Oklahoma Natural Gas Company when it purchased the distribution system of the Oklahoma Gas and Electric Company and thereafter continued the service theretofore rendered Wilson & Co. by the Oklahoma Gas and Electric Company, the questions involved are not moot as to the Oklahoma Natural Gas Company for the reasons set forth by this Court in the case of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young*, 219 U. S. 498, wherein this Court, at page 514, said:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress. * * *
>
> "In *Boise City Irr. & Land Co.* v. *Clark*, *supra*, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality,

and it was contended that the case had become moot. The Court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.' ''

CONCLUSION

We respectfully submit that Order No. 3388 of the Corporation Commission of Oklahoma is and was invalid as being repugnant to the Constitution of the United States, and that the three-judge court, sitting in the United States Court for the Western District of Oklahoma, had jurisdiction to so declare and to restrain the state officials from enforcing said order by means of penalties or otherwise, and to restrain Wilson & Co. and the Oklahoma Packing Company from enforcing or attempting to enforce the order by assertion of alleged rights based upon or arising therefrom; and that said Court erred in refusing so to do and in dismissing complainants' bill.

Respectfully submitted,

ROBERT M. RAINEY,
STREETER B. FLYNN,
I. J. UNDERWOOD,
R. M. CAMPBELL,
Attorneys for Appellants.

RAINEY, FLYNN, GREEN & ANDERSON,
ALLEN, UNDERWOOD & CANTERBURY,
Of Counsel.

APPENDIX

Constitution of Oklahoma

Article IX

Section 19. In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject

of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense; Provided, That should the operation of such order or requirement be suspended, pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

SECTION 20. From any action of the Commission prescribing rates, charges, or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as hereinafter provided for, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to cost, as may be prescribed by law) may be taken by the corporation whose rates, charges, or classifications of traffic, schedule, facilities, convenience, or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the State. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right, and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates,

charges, or classifications of traffic, schedules, facilities, conveniences, or service are affected, the State shall be made the appellee; but, in other cases mentioned, the corporation so affected shall be made the appellee. The Legislature may also, by general laws, provide for appeals from any other action of the Commission, by the State, or by any person interested, irrespective of the amount involved. All appeals from the Commission shall be to the Supreme Court only, and in all appeals to which the State is a party, it shall be represented by the Attorney General or his legally appointed representative. No court of this State (except the Supreme Court, by way of appeals as herein authorized) shall have jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties: Provided, However, That the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission in all cases where such writs, respectively, would lie to any inferior court or officer.

SECTION 21. Upon the granting of an appeal, a writ of supersedeas may be awarded by the Supreme Court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the Supreme Court, no action of the Commission prescribing or affecting the rates, charges, or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceeding resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by the Commission (or approved, on review, by the Supreme Court), payable to the State, and sufficient in amount and security to insure the prompt refunding, by the appealing corporation to the parties entitled thereto, of all

charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the Court on appeal. The Commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any supersedeas), of the order or requirement appealed from, to keep such accounts, and to make to the Commission, from time to time, such reports, verified by oath, as may, in the judgment of the Commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the Commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company, pending the appeal, be not sustained on such appeal; and the Commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase the said suspending bond, whenever, in the opinion of the Commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner and through such methods of distribution as may be prescribed by the Commission, or by law. All such appeals, affecting rates, charges, or classifications of traffic, shall have precedence upon the docket of the Supreme Court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the habeas corpus, and State cases already on the docket of the court.

SECTION 22. In no case of appeal from the Commission, shall any new or additional evidence be introduced in the Supreme Court; but the chairman of the Commission,

under the seal of the Commission, shall certify to the Supreme Court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence, so introduced, or considered as the Commission may deem proper to certify. The Commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the Supreme Court, upon disposing of the appeal. The Supreme Court shall have jurisdiction on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal; Provided, However, That the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable, and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided.

SECTION 23. Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges, or the classifications of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such orders as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the

Commission at the time the original order appealed from was entered. The right of the Commission to prescribe and enforce rates, charges, classifications, rules and regulations affecting any or all actions of the Commission theretofore entered by it, and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the Commission, prescribing or altering such rates, charges, classifications, rules, or regulations, shall be retroactive.

SECTION 24. The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the Commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the Commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding shall the reasonableness, justness, or validity of any rate, charge, classification of traffic, rule, regulation, or requirement, theretofore prescribed by the Commission, within the scope of its authority, and then in force, be questioned: Provided, However, That no case based upon or involving any order of the Commission shall be heard or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court, as authorized by this Constitution or by any law passed in pursuance thereof.

SECTION 7904, C. O. S. 1921. (This section is amended in an unimportant particular by Section 11517, O. S. 1931.) Every domestic gas pipe line corporation in this State is

hereby given authority to build, construct and maintain gas pipe lines, over, under across or through all highways, bridges, streets or alleys in this State, or any public place therein, under the supervision of the inspector of oil and gas as to where and how in said highways, bridges, streets, alleys and public places said pipe lines shall be laid, subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law: Provided, However, That whenever any gas pipe line crosses the land or premises of any one outside of a municipality, said corporation shall, upon request of the owner of said premises, connect said premises with a pipe line and furnish gas to said consumer at the same rate as charged in the nearest city or town.

SECTION 3470, C. O. S. 1921. The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges was made, or may thereafter be declared to be the legal rate which should an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge has been applied to the service rendered; and second, to whom the overcharge should be paid.

The above section appears in the O. S. 1931, in its amended form, as Section 3626, as follows:

SECTION 3626, O. S. 1931. The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such

charge was made, or may thereafter be declared to be the legal rate which should have been applied to the service rendered; and, second, to whom the overcharge should be paid.

SECTION 3471, C. O. S. 1921. (This section appears in O. S. 1931 as Section 3627.) Upon ascertaining the amount of overcharge due from any public service corporation, person or firm, the Corporation Commission shall have authority to render judgment against such public service corporation, person, or firm, for the amount of such overcharge that may have been collected from the public in violation of any legal rate, or order of the Commission, if necessary to insure the prompt payment of the same to the Commission. Such judgment shall be a lien upon the property of the public service corporation, person, or firm, and shall be collected in the same manner that fines and penalties imposed by the Corporation Commission are now authorized to be collected by law, and, when collected, shall be paid immediately by the Commission to the parties to whom it is due.